LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 23 1963
JOHN F. DAVIS, CLERK

No. 88

In the

Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, *et al.*, *Respondents*.

BRIEF FOR RESPONDENTS

DAVID PREVIANT
212 West Wisconsin Avenue
Milwaukee, Wisconsin

HUGH HAFER

RICHARD P. DONALDSON
811 Alaska Building
Seattle, Washington

Counsel for Respondents.

THE ARGUS PRESS, SEATTLE

No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, *et al.*, *Respondents*.

BRIEF FOR RESPONDENTS

DAVID PREVIANT
212 West Wisconsin Avenue
Milwaukee, Wisconsin

HUGH HAFER

RICHARD P. DONALDSON
811 Alaska Building
Seattle, Washington

Counsel for Respondents.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Summary of Argument	1
I. The Union's Peaceful Picketing at the Premises of the Safeway Stores Was Conducted for the Sole Purpose of Persuading Members of the Public to Refrain from Purchasing Tree Fruits Apples (*i.e.*, a Primary Product Boycott) and Was Wholly Devoid of Any "Signal" Content; Accordingly Such Picketing Did Not Violate Section 8(b)(4)(ii)(B) of the Act	5
A. Section 8(b)(4)(ii) of the Act Does Not Purport to Equate Consumer Picketing with "Coercion" as that Term Is Used in the Act	7
1. The term "restrain or coerce" is a restricted phrase and does not *per se* encompass peaceful picketing	7
2. Properly read, Section 8(b)(4) prohibits consumer picketing only if there is evidence *aliunde* that the picketing was coercive	9
3. The legislative history of the 1959 amendments to the Act does not support the Board's contentions	12
B. The Union's Consumer Picketing Did Not Have an Object of Forcing or Requiring Safeway to Cease Doing Business with Tree Fruit	17
II. Since Picketing Is Protected by the First Amendment, the Board's Claim that Picketing *per se* Is "Coercion" Raises Substantial Constitutional Issues; and When the Act Is Applied to Restrain the Union's Consumer Picketing, the Act Is Unconstitutional	21
A. The Board's View of the Act Unnecessarily Raises Substantial Constitutional Issues	21
B. The Act Is Unconstitutional When Applied to Prohibit the Union's Consumer Picketing	27
Conclusion	28

Page

Appendix A—Decision of Appeal Tribunal Employment Security Department, State of Washington 31

Schedule of Employers and Claimants Lydia Hadley, *et al.* (omitted) 36

TABLE OF CASES

Bakery Drivers Local v. Wohl, 315 U.S. 769 23

Bantam Books v. Sullivan, 9 L.Ed.2d 584 23

Carlson v. California, 310 U.S. 106 23

Carpenters Local 1976 v. Labor Board, 357 U.S. 93 20

Chauffeurs Union v. Newell, 356 U.S. 341, *reversing* 180 Kan. 898, 317 P.2d 817 ..... 27, 28

Curtis Bros. Inc., 114 NLRB 116 8

Douds v. Int'l Longshoremen's Ass'n, 224 F.2d 455 (CA 2) 4, 18

Drivers Local 639 v. Labor Board, 362 U.S. 274 ..... 2, 7, 8, 27

Drivers Union v. Meadowmoor Co., 312 U.S. 287 23

Eastern R.R. Conf. v. Noerr Motor Freight, 365 U.S. 127 19

Hughes v. Superior Court, 339 U.S. 460 ..... 23, 24, 25, 26

Int'l B'hood of Electrical Workers v. Labor Board, 341 U.S. 694 ..... 2, 7

Jarecki v. G. G. Searle & Co., 367 U.S. 303 7

Jay Jacobs Downtown, Inc., 140 NLRB 127 24

Knights Templar & M. Life Indem. Co. v. Jarman, 187 U.S. 197 ..... 4, 22

Labor Board v. Gullett Gin Co., 340 U.S. 361 9

Labor Board v. Servette, Inc., No. 111, Oct. Term 1963 8

Local 761 v. Labor Board, 366 U.S. 667 ..... 12, 18, 20

NLRB v. Bakery & Confectionery Workers Local 50, 245 F.2d 542 (C.A. 2) 10

NLRB v. Brewery Workers Local 366, 272 F.2d 817 (C.A. 10) 10

Page

NLRB v. Business Machines & Appliance Mechanics, 228 F.2d 553 (C.A. 2), *cert denied* 351 U.S. 962 10

NLRB v. General Drivers Local 968, 225 F.2d 205 (CA 5), *cert. denied* 350 U.S. 914 10

Near v. Minnesota, 283 U.S. 697 23

Radio Officers Union v. Labor Board, 347 U.S. 17 20

Redwing Carriers, Inc., 137 NLRB 1545 24

Retail Clerks Local 770 v. NLRB, 296 F.2d 368 (C.A.D.C.) 19

Roth v. United States, 354 U.S. 476 23

Seafarers International Union v. Labor Board, 265 F.2d 585 (C.A.D.C.) 8, 18, 19

Smith v. California, 361 U.S. 147 23

Staub v. Baxley, 355 U.S. 313 ..... 5, 23, 27

Talley v. California, 362 U.S. 60 ..... 5, 27

Teamsters v. Vogt, 354 U.S. 284 23

Teamsters Local 357 v. Labor Board, 365 U.S. 667 ..... 10, 20

Thornhill v. Alabama, 310 U.S. 88 25

United States v. CIO, 335 U.S. 106 22

United States v. Delaware & H. Co., 213 U.S. 366 22

United Wholesale and Warehouse Employees, Local 261 (Perfection Mattress & Spring Company), 129 NLRB No. 125 11

Wayman v. Southard, 10 Wheat. 1 9

Wholesale Employees Local 261 v. NLRB, 282 F.2d 824 (C.A.D.C.) 10

Wood v. Georgia, 370 U.S. 375 23

TEXTS

Professor Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 1086 14

Barkin, "The Decline of the Labor Movement" Center for the Study of Democratic Institutions (1961) 24

Fleming, "Title VII: The Taft-Hartley Amendments," 54 Northwestern U.L. Rev. 666, 667 13

STATUTES

	Page
National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151 *et seq*	5
§ 8(b)(1)	8
§ 8(b)(4)	7, 9, 10, 11, 15, 17, 20
§ 8(b)(4)(i)	11, 12
§ 8(b)(4)(ii)	2, 3, 12, 13
§ 8(b)(4)(ii)(B)	5, 7, 9
§ 8(b)(7)	2, 9, 24
§ 13	8

OTHER AUTHORITIES

H.R. Rep. No. 510, 80th Cong. 1st Sess. 43	14-15
2 Leg. Hist. 681	16
2 Leg. Hist. 1351	15
2 Leg. Hist. 1377(2)	3, 15, 16
2 Leg. Hist. 1383(3)	3, 15
2 Leg. Hist. 1432(1)	16
2 Leg. Hist. 1386(1)	3, 15
2 Leg. Hist. 1702	15
2 Leg. Hist. 1357	21

In the

Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, *et al.*,
Respondents.

No. 88

BRIEF FOR RESPONDENTS

SUMMARY OF ARGUMENT

During the course of the 1960 negotiations between Respondent Local 760 and Tree Fruits Labor Relations Committee, which represented 21 Yakima Valley employers, an impasse developed and a strike was called. Within a week a majority of the struck employers were back in full production. In furtherance of the dispute the Respondents engaged in peaceful picketing and handbill distribution at the premises of Safeway Stores located in Seattle. The legend on the picket sign, the handbills, written instructions to the pickets and letters to the Safeway store managers made it abundantly clear that the Respondents were asking the public to refrain from purchasing Tree Fruit apples and that Respondents had no dispute with Safeway. Safeway experienced no interference with deliveries, there were no work stoppages or slowdowns and there was no inter-

ference with customer ingress or egress. The Board concluded that Respondents violated Section 8(b)(4)(ii)(B); however its order was denied enforcement in the court below.

The portion of the Act primarily relied upon by the Board interdicts threats, restraint and coercion by unions against employers. Since the record contains no evidence which would justify a finding of unfair labor practice, the Board asserts that the Respondents' conduct constituted *per se* a violation of the Act. The language of the Act and its settled construction are to the contrary.

When Congress enacted the 1959 amendments to the Act, it chose language ("threaten, restrain or coerce") which had been construed by this Court as having a "restricted" connotation *(Int'l B'hood of Electrical Workers v. Labor Board,* 341 U.S. 694, 701-703), language which did not *per se* encompass peaceful picketing. *Drivers Local 639 v. Labor Board,* 362 U.S. 274, 284. Had Congress intended to proscribe picketing as such it would have used the term "picket" in Section 8(b)(4)(ii) as it did in the proviso to that Section and in Section 8(b)(7) of the Act.

Properly construed, Section 8(b)(4)(ii) reaches picketing conducted at the premises of a retail store if there is evidence in the record that the picketing is designed to be coercive of the retailer. In the absence of such evidence—and in this case there is none—the picketing does not violate the law. The proviso relating to handbills merely exempts coercive, non-picketing programs absent proof that the program was intended

to cause work stoppages. In other words, in picketing cases a violation exists where there is proof of (1) unlawful means and (2) unlawful object. In non-picketing cases a violation exists where there is proof of (1) unlawful means, (2) unlawful object and (3) intended effect. The Board in this case has not proved either unlawful means or object.

The legislative history of the Act neither supports nor requires the Court to adopt the Board's *per se*, irrebuttable presumption approach to Section 8(b)(4)(ii). Fairly read the legislative history of the Act evidences a concern over the use of consumer boycotts designed to impose an embargo upon a retailer doing business with a struck firm (2 Leg. Hist. 1383 (3), 1386 (1), 1377(2)). There is no evidence of an intention to prohibit programs designed to persuade the public to refrain from purchasing a particular product which, as the Board itself acknowledges, is not in the classical sense a secondary boycott. Accordingly, it is submitted that neither the language of the Act nor its legislative history support the Board.

Moreover, there is a total absence of record evidence to support the Board's conclusion that the Respondents sought to achieve an unlawful objective. And as true with respect to its findings of unlawful means (i.e. restraint and coercion) the Board substituted presumption for evidence. The Board's finding of object was premised on the theory that consumers might not buy as many Tree Fruits apples as they did formerly and then Safeway might not buy Tree Fruits apples, and when Safeway did that it would have ceased doing business with Tree Fruits employers. Since the Union

must have foreseen this, says the Board, the Respondents' objective was to cause Safeway to cease doing business with Tree Fruits employers. It is respectfully submitted that compound possibilities should not be allowed to stand in the stead of evidence. When possible "effects" are equated with "objective," the distinction between lawful primary and unlawful secondary conduct becomes hopelessly confused. *Douds v. Int'l Longshoremen's Ass'n*, 224 F.2d 455, 459 (C.A. 2). It is possible that Safeway would have continued to purchase the same number of Tree Fruits apples as it formerly had purchased; it is possible that Safeway would have purchased fewer Tree Fruits apples, and it is possible that Safeway would have ceased purchasing such apples. But there is not one iota of evidence in the record to justify the Board's finding that it was the Respondents' objective to force or require Safeway to cease doing business with Tree Fruits employers.

Moreover, the Board's view of the Act unnecessarily creates substantial constitutional problems. The picketing in this case was totally devoid of any "signal" or speech-plus content. On the record before this Court, it cannot be said that Respondents were engaged in anything more than an exercise of free speech. A substantial First Amendment right is involved in this case. This fact alone is sufficient reason to reject the Board's construction of the Act which necessarily questions the existence of that right. *Knights Templars' & M. Life Indem. Co. v. Jarman*, 187 U.S. 197, 205.

If the Board's reading of the Act is adopted by this Court—and it should not be—the Act is patently unconstitutional as construed and applied to the facts of

this case. Pure communication, nothing more, is revealed by the stipulations and exhibits which make up the record in this case. Therefore, it is incumbent upon the Court to test the Respondents' claim of right by the standards enunciated in non-picketing cases such as *Staub v. Baxley*, 355 U.S. 313, 322-325 and *Talley v. California*, 362 U.S. 60, 63, 65. The Act as construed and applied by the Board cannot survive the experience.

I. THE UNION'S PEACEFUL PICKETING AT THE PREMISES OF THE SAFEWAY STORES WAS CONDUCTED FOR THE SOLE PURPOSE OF PERSUADING MEMBERS OF THE PUBLIC TO REFRAIN FROM PURCHASING TREE FRUITS APPLES (*I.E.* A PRIMARY PRODUCT BOYCOTT) AND WAS WHOLLY DEVOID OF ANY "SIGNAL" CONTENT; ACCORDINGLY SUCH PICKETING DID NOT VIOLATE SECTION 8(b)(4)(ii)(B) OF THE ACT

On August 29, 1960 the Union[1] commenced a strike against the 21 employers represented by Tree Fruits. Within a week most of the struck employers—notwithstanding the strike—were back in full operation (Appendix A., *infra*, pg. 34). In December, 1960 the Union, in furtherance of its dispute, decided to ask "the public not to buy" (R. 19) apples packed "by non-union strike breaking workers. . . ." (R. 31). This was done by peaceful picketing at Safeway Stores and by the distribution of handbills (R. 19-21). Care was taken to

[1] Respondent Fruit & Vegetable Packers and Warehousemen, Local 760, and Respondent Joint Council 28 are both affiliates of the International Brotherhood of Teamsters, Warehousemen and Helpers of America and are referred to in this brief as the "Union." Tree Fruits Labor Relations Committee, Inc., the charging party, is referred to as "Tree Fruits." Petitioner National Labor Relations Board is referred to as the "Board." The National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151 *et seq.* is referred to as the "Act."

avoid any involvement of Safeway employees or interference with customer ingress or egress (R. 19-21, 27-30). Similarly, care was taken to specifically advise the public that the Union was not engaged in a strike against Safeway (R. 27-28, 31-32). On January 9, 1961, Tree Fruits—not Safeway—filed the unfair labor practice charges which gave rise to this case (R. 2).

The record in this case is devoid of evidence tending to show that the Union's program had the slightest impact on Safeway. As the court below noted, "there was no work stoppage, no interruption of deliveries, no violence or threat of violence. The record does not show whether pickets 'confronted' consumers or whether consumers felt 'coerced' by their presence. Nor does the record show that the picketing — directed against only one of hundreds of products sold by Safeway — caused or was likely to cause substantial economic injury" (R. 65-66).

Given a record devoid of evidence tending to support a finding that the Union's picketing was coercive, it is understandable that Board attempts to support its finding of unfair labor practice by asserting that consumer picketing is *per se* coercive and therefore unlawful (R. 41, 59-60; Board Br. pg. 13). As will be demonstrated below, the Board's contentions are not supported by the Act and unnecessarily raise substantial constitutional problems.[2]

[2] As used in this brief the term "consumer picketing" is used as a shorthand reference to describe the Union's activities as revealed by the record in this case; namely a request to consumers to refrain from purchasing Tree Fruit apples. The request was communnicated by handbills and picket signs; however, consumers were specifically advised that the Union had no dispute with Safeway.

A. Section 8(b)(4)(ii) of the Act Does Not Purport to Equate Consumer Picketing with "Coercion" as that Term Is Used in the Act.

Section 8(b)(4)(ii)(B) provides that it is unlawful for a labor organization "to threaten, coerce, or restrain . . . any person . . . where . . . an object thereof is . . . forcing or requiring any person to cease doing business with any other person. . . ." The third proviso to Section 8(b)(4) declares "that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that . . . products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ."

In construing this language "We look first to the face of the statute" (*Jarecki v. G. G. Searle & Co.*, 367 U.S. 303, 307) for the "[m]ost relevant [legislative material], of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate." *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 100 (1958).

1. The term "restrain or coerce" is a restricted phrase and does not *per se* encompass peaceful picketing.

When it enacted Section 8(b)(4)(ii), Congress selected language ("threaten, coerce or restrain") which had been given a definitive antecedent construction in *Int'l B'hood of Electrical Workers v. Labor Board*, 341 U.S. 694, 701-703 (1951). Discussing its ruling in the *Electrical Workers* case, this Court in *Labor Board v. Drivers Local 639*, 362 U.S. 274, 284, observed:

"In *International Brotherhood of E.W. v. NLRB*, 341 U.S. 694, the Court, in holding that a peaceful strike to promote self-organization was proscribed by Section 8(b)(4)(A) if its objective was to 'induce or encourage' a secondary boycott contrasted the language of the two subsections and labeled the words 'restrain or coerce' in Section 8(b)(1)(A) a 'restricted phrase' to be equated with 'threat or reprisal or force or promise of benefit.' 341 U.S. at 701-703."

The *Drivers Local 639* case overturned the Board's so-called Curtis Brothers[3] doctrine. Under that doctrine picketing having a recognitional purpose was treated as a restraint or coercion of the right of non-employees to retain their unorganized status. This Court, affirming the Court of Appeals for the District of Columbia, rejected the Board's contention. In doing so, this Court noted that "Section 13 of the Act is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act." 362 U.S. at 282. Although the *Drivers Local 639* case arose under Section 8(b)(1) of the Act, the Court's reading of that Section in *pari materia* with Section 13 is plainly applicable to this case. See *e.g. Seafarers International Union v. Labor Board*, 265 F.2d 585, 591 (C.A.D.C.).[4]

---

[3] *Curtis Bros. Inc.*, 114 NLRB 116.

[4] As the Board noted in *Labor Board v. Servette, Inc.*, No. 111, Oct. Term 1963, Br. pg. 12, note:

"In the classical sense, this [a product boycott] is not even a secondary but only a primary boycott. See *Teller, Labor Disputes and Collective Bargaining* (1940), Vol. I, Sec. 145; *Duplex Printing Co. v. Deering*, 254 U.S. 443, 446."

In short, both before and after the enactment of the 1959 amendments to the Act, this Court accorded a "restricted" meaning to the term "restrain or coerce"; a meaning which barred the Board from treating peaceful picketing as the legal equivalent of "restrain or coerce." The Congress was not unaware of this *(Labor Board v. Gullett Gin Co.,* 340 U.S. 361, 366), as is evidenced by the fact that Congress used the term "picketing" as a term of art in Section 8(b)(7) and in the proviso to Section 8(b)(4).

2. Properly read, Section 8(b)(4) prohibits consumer picketing only if there is evidence *aliunde* that the picketing was coercive.

The Board argues, as it must, that consumer picketing *per se* is coercive of the retailer; but, as *Drivers Local 639* teaches, the term "restrain or coerce" is a restricted phrase and does not *per se* encompass picketing.

The proviso to Section 8(b)(4) merely excepts from the term "threaten, restrain or coerce" non-picketing programs, even though coercive, absent proof of intended effect.[3] The office of a proviso is to limit, not expand, that which precedes it. *Wayman v. Southard,* 10 Wheat. 1, 30. Stated differently, it is respectfully submitted that the "consumer boycott" proviso should be read as imposing an excepting rule of construction

[3] Section 8(b)(4)(ii)(B) makes it unlawful:
"... to threaten, coerce, or restrain ... any person ... where ... an object thereof is ... forcing or requiring any person to cease doing business with any person ..."
The proviso states:
"... nothing contained in [Sec. 8(b)(4)] shall be construed to prohibit publicity, other than picketing ... so long as such publicity do[es] not have an effect" of causing a work stoppage.

which accords preferred treatment to non-picketing publicity. Under the view here urged, non-picketing publicity would come within 8(b)(4) only upon proof of: (1) proscribed inducement or coercion, and (2) proscribed objective, and (3) intended effect as defined in the proviso. Such rule is to be contrasted with that applicable in picketing cases in which proof of the third element, intended effect, is not required. The point does not require further elaboration, since the Board does not attempt to defend in this Court the view expressed in its opinion (R. 41) that the "proviso" independently prohibits consumer picketing.

In essence, this case represents but another attempt by the Board to substitute a *per se* rule for record evidence. *Compare: Teamsters Local 357 v. Labor Board*, 365 U.S. 667, 676. The Board until recently was of the view that picketing at secondary premises was *per se* a prohibited "inducement" of secondary employees. A contrary consensus of judicial opinion developed[*] and the Board ultimately abandoned its *per se* inducement rule. Explaining its present view the Board in this case stated (R. 39-40):

> "The General Counsel contends that the conduct of Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act under the Board's decision in the *Perfection Mattress* case.
>
> "1. In that case a majority of the Board held that a picket line at the premises of a secondary

[*] *Wholesale Employees Local 261 v. NLRB*, 282 F.2d 824, 826-827 (CA DC); *NLRB v. Brewery Workers Local 366*, 272 F.2d 817, 819 (CA 10); *NLRB v. Bakery & Confectionery Workers Local 50*, 245 F.2d 542 (CA 2); *NLRB v. General Drivers Local 968*, 225 F.2d 205, 210-211 (CA 5), *cert. denied* 350 U.S. 914; *NLRB v. Business Machines & Appliance Mechanics*, 228 F.2d 553 (CA 2), *cert. denied* 351 U.S. 962.

> employer necessarily invites employees to make common cause with the picketing union and to refrain from working behind the picket line, irrespective of the literal appeal of the legends on the picket sign. Accordingly, the majority concluded that the picketing of retail stores with signs urging customers not to buy products of the primary employer constituted inducement or encouragement of employees of neutral employers within the meaning of Section 8(b)(4)(i) of the Act. The Board has reconsidered this doctrine of the *Perfection Mattress* case and a majority has now decided that picketing of a secondary employer's premises does not *per se* constitute inducement or encouragement of employees of neutrals within the meaning of clause (i) of Section 8(b)(4), nor does it raise an irrebuttable presumption as to the intent or probable consequences of the picketing. Whether in any given case picketing is intended or calculated to 'induce or encourage' employees of secondary employers to engage in a work stoppage or refusal to perform services is to be determined by all the evidence in *that particular* case and not by an *a priori* assumption."

Having rejected a *per se, a priori* rule in cases involving an allegedly unlawful "inducement," the Board in the same breath asserts that all consumer picketing is *per se* "coercion." As the cases collected in footnote 6, *supra*, pg. 10, demonstrate and as the Board now acknowledges, in cases involving alleged violations of Section 8(b)(4)(i), *per se* rules are inconsistent with the origin, purposes and language of Section 8(b)(4). *Per se* rules fly in the face of this Court's admonition that there is " '[n] o rigid rule which would make . . . [a] few factors conclusive [which] is con-

tained in or deducible from the statute.' " *Local 761 v. Labor Board,* 366 U.S. 667, 674. The Board should not be permitted to engraft upon Section 8(b)(4)(ii) a *per se* rule more onerous than that which it unsuccessfully attempted to engraft upon Section 8(b)(4)(i).

Although there is no rule of law requiring logical consistency in the reading of different portions of a single statute, certainly consistency is to be preferred if the statute permits it. Thus, if, as this Court has said, "coercion" is a "restricted phrase" when contrasted with "inducement," it is, we submit, reasonable to conclude that Section 8(b)(4)(i) has a broader reach than does 8(b)(4)(ii). Yet, in this case, the Board *on the facts* found no "inducement" while simultaneously postulating an irrebuttable presumption of "coercion."

Paraphrasing the Board's decision in this case, it is submitted that the question of whether picketing restrains or coerces "is to be determined by all the evidence in [the] particular case and not by *a priori* assumption" (R. 40). The fact of "picketing of a secondary employer's premises does not *per se* constitute" coercion "nor does it raise an irrebuttable presumption as to the intent or probable consequences of the picketing" (R. 39-40). This was the construction adopted by the court below (R. 65-66) and the construction which this Court should adopt.

3. The legislative history of the 1959 amendments to the Act does not support the Board's contentions.

The Board in its opinion in this case expressed the view that "by literal wording of the proviso [to Section 8(b)(4)] as well as through the interpretive gloss

placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited" (R. 41). Presently, however, the Board contends that such picketing constitutes "coercion" within the meaning of Section 8(b)(4)(ii) and that any other reading of the Act would constitute a repudiation of the intention of the Congress. The "legislative history" of the 1959 amendments to the Act is, we submit, at best confused and unreliable. As one close student put it (Fleming, "Title VII; The Taft-Hartley Amendments," 54 Northwestern U. L. Rev. 666, 667):

> "Analysis of the amendments is rendered more difficult by the lack of a satisfactory legislative history. The Landrum-Griffin bill, which passed the House, was made up of provisions taken from other bills; it differed from the Kennedy-Ervin bill, which passed the Senate, principally in the Taft-Hartley amendments. No hearings were ever held on the Landrum-Griffin bill, and the extensive Kennedy-Ervin hearings are of little help since that bill contained only minor Taft-Hartley changes. When the conferees from the House and the Senate had adjusted their differences they offered the Labor-Management Reporting and Disclosure Act of 1959 to both houses. The Managers on the Part of the House submitted a Conference Report which is both incomplete and at times confusing, and the Senate simply heard a report from Senator Kennedy, and then engaged in a limited amount of debate. This meager legislative history, plus the compromises without which the conferees could not compose their differences, foretell prolonged litigation before it will be possible to say with any degree of confidence what some of the amendments mean."

Professor Aaron expressed the same thought perhaps more picturesquely when he said ("The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 1086, 1126):

> "Anyone who has followed the history of the Taft-Hartley Act since its passage in 1947 cannot fail to be impressed by the achievement of the Eighty-sixth Congress in agreeing upon substantial amendments to that law. The result, however, does not excite admiration; rather, it reminds one of the celebrated comparison made by Samuel Johnson between a woman preaching and a dog walking on his hind legs: 'It is not done well; but you are surprised to find it done at all.'"

To the extent that the legislative history is helpful it indicates that the Congress was concerned about the use of consumer picketing as a device to impose an embargo against a retail establishment; that is, picketing for the purpose of inducing customers to cease patronizing the picketed store because that store is handling an unfair product. There is no clear evidence of an intent to proscribe a product boycott which "in a classical sense . . . is not even a secondary, but only a primary, boycott" (Bd. Br. in *Servette*, pg. 12n, No. 111, October 1963 Term). The Board's repeated use of the term "secondary consumer boycott" (Bd. Br. 9, 12, 16, 27, 29) represents a wholly unjustifiable effort to add unfavorable coloration to conduct which on the record in this case is without question primary in character.

The "secondary boycott" at which the Act was aimed, when originally enacted in 1947, was a boycott of "employer A because employer A uses or otherwise deals in the goods of, or does business with employer B" (H.R.

Rep. No. 510, 80th Cong. 1st Sess. 43). Because such boycotts were from time to time effectuated through means which did not violate Section 8(b)(4) Congress amended the Act in 1959. When Senator Goldwater and then Senator Kennedy talked about "consumer boycotts" they were referring to a boycott of the secondary employer.[7] Accordingly, the Board's reliance upon Senator Kennedy's statement that "we were not able to persuade the House Conferees to permit picketing in

---

[7] Upon passage of the House bill on August 14, 1959, the House appointed its conferees to meet with the Senate (2 Leg. Hist. 1702). The Senate appointed its conferees on August 17, 1959 (2 Leg. Hist. 1351). While the bills were being considered in conference, Senate conferees on several occasions made statements to the Senate.

Senator Goldwater, in an attempt to clarify misunderstandings as to the meaning of certain terms, including "secondary consumer boycott," made the following statement:

"I have . . . prepared a glossary of terms which might be used in any debate which might ensue over any legislation. I am also mailing a copy of it to each of my colleagues, because *I find in speaking to them there is a general misunderstanding of many of these terms*, which seem rather simple to those who live with them day after day.

* * *

"1. Secondary boycott: A secondary boycott involves the application of pressure—usually economic pressure—on one company for the purpose of forcing it to stop doing business with another company. There are two types of secondary boycotts: the secondary employee boycott and the secondary consumer boycott.

* * *

"A secondary consumer, or customer, boycott involves the refusal of consumers or customers to buy the products or services of one employer in order to force him to stop doing business with another employer" (2 Leg. Hist. 1386 (1)).

In the midst of the conference, the Senate conferees returned to the Senate to report on their progress. Senator Kennedy stated that the Senate conferees had agreed to "prohibit threats or coercion of employers" (2 Leg. Hist. 1383 (3)). He added, however, that they were insisting on a "publicity proviso," the effect of which he stated would be as follows:

"Workers would not be denied under the substitute the traditional right to ask the public not to patronize one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute" (2 Leg. Hist. 1377 (2)).

This is the only explanation of the purpose of the proposed "publicity proviso" which we have found.

front of that secondary shop" is misplaced (Bd. Br. 24-25). The Board has taken the statement out of context. Senator Kennedy had previously announced that the purpose of *his* proviso was to preserve "the traditional right to ask the public not to patronize one who sells nonunion goods" (2 Leg. Hist. 1377 (2)). The sentence quoted by the Board refers to a compromise reached by the conferees with respect to that traditional right. In context, it does not refer to picketing which asks only a boycott of the primary product, for such picketing was not under discussion. Indeed, the affirmation of "buy-America" campaigns (2 Leg. Hist. 1432 (1)) which immediately follows the sentence relied on by the Board, belies the significance which the Board would attach to the sentence. We therefore submit that the Legislative History on the Senate side neither supports nor requires the construction contended for by the Board.

In the House, Congressman Griffin, whose name forms a part of the colloquial title of the 1959 amendments, said (2 Leg. Hist. 681):

> "... If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.
>
> "MR. BROWN: * * * Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?
>
> "MR. GRIFFIN: Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce

the retailer not to do business with the manufacturer, whether it is plumbing—

"MR. BROWN: * * * Advertising.

"MR. GRIFFIN: Advertising, or anything else, it would be covered by our bill. It is not covered now."

If Congressman Griffin meant what he said, it is obvious that he attached two important conditions to the applicability of the Act to consumer picketing. First, the picketing must be actually intended to coerce the retailer. Second, the Act must be read in light of the Union's rights of free speech guaranteed by the First Amendment. The Board in this case fails on both counts.

There was no coercion of Safeway in this case. Indeed Safeway was not sufficiently concerned to file an unfair labor practice charge. There were no work stoppages or interferences with deliveries. There is no evidence that Safeway suffered in any way or was likely to suffer any injury as a consequence of the Union's activity.

B. The Union's Consumer Picketing Did Not Have An Object of Forcing or Requiring Safeway to Cease Doing Business with Tree Fruit.

Independently of the reasons set forth above, the Union submits that the Board's order was properly set aside because the record will not support a finding that the Union sought an objective proscribed by Section 8(b)(4). As Judge Learned Hand has observed, "the 'object' of an action is the concluding state of things that the actor seeks to bring about: that which

satisfies his aim. Hence, it is a term relative to a whole sequence of steps that he proposes, and it does not apply to those which are only intermediate to it." *Douds v. Int'l Longshoremen's Ass'n*, 224 F.2d 455, 459 (CA 2). Different language was used to make the same point in *Seafarers Int'l Union v. NLRB*, 265 F.2d 585, 591-592 (C.A.D.C.):[8]

> "The statute makes the 'object thereof' the critical factor. Did the union intend to place a boycott on [the primary employer] alone, with only an incidental economic effect on [the neutral employers], or did it intend to place a boycott on [the neutral employers] along with [the primary employer]?"

The only "object" which the Union sought to achieve is that alleged in paragraph VII of the amended complaint and admitted in the Union's answer. The Complaint alleges in paragraph VII (R. 12) and the Answer admits (R. 14) that:

> "Commencing on or about December 27, 1960, respondent local . . . in furtherance of the objects referred to in paragraph VI hereof [to obtain certain contractual agreements on behalf of the employees of the employer members of Tree Fruits] engaged in picketing at the premises of retail stores of Safeway, located in and about Seattle, Washington. . . ."

The Union, by the legend carried on its picket signs (R. 20), the instructions issued to its pickets (R. 27-28), and the handbills which it distributed in connection with the boycott program (R. 32), made it plain to all that it was boycotting "Washington State

[8] This case was approvingly cited in *Local 761 v. Labor Board*, 366 U.S. 667, 673.

Apples" and not Safeway. No demands of any kind were made on Safeway. The thrust of the boycott was against Tree Fruits. Safeway did not suffer even "incidental economic effects." *Seafarers International Union v. NLRB*, 265 F.2d 585, 591-592 (C.A.D.C.).

Faced with a record barren of evidence supporting the claim that the Union sought a proscribed objective, the Board again invoked legal presumption:

> "The purpose of picketing the Safeway stores was to persuade consumers not to purchase non-union Washington State apples which Safeway in turn purchased from members of Tree Fruits. The natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers. It is reasonable to infer, and we do, that Respondents intended this natural and foreseeable result. Accordingly, we find that the foregoing picketing violated Section 8(b)(4)(ii)(B) of the Act." (R. 41)

In the first place, the Board's implied holding that a possible reduction in purchases is tantamount to a cessation of business is unprecedented. *Compare: Retail Clerks Local 770 v. NLRB*, 296 F.2d 368 (C.A.D.C.). What the Board has done is to substitute *possible* "incidental economic effects" for the statutorily required proof of objective. Neither the employer's fears nor the Union's hopes are relevant here. *Cf. Eastern R. R. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 142-143; *Seafarers Int'l Union v. NLRB*, 265 F.2d 585, 592 (C.A.D.C.).

To equate "object" and "effect" is to destroy the line between "primary" and "secondary" conduct. Al-

though the line is not "glaringly bright," the Act "compels the task" of "the drawing of lines more nice than obvious." *Local 761*, 366 U.S. at 673, 674. Compound possibilities relied upon by the Board will not suffice.

Since the enactment of the Wagner Act this Court has consistently required proof of a proscribed objective. In *Teamsters 357 v. Labor Board*, 365 U.S. 667, the Board argued that hiring hall clauses were illegal *per se* unless they contained protective stipulations. The Board argued that in light of *Radio Officers Union v. Labor Board*, 347 U.S. 17, it was required only to show that the "tendency to encourage or discourage union membership was *foreseeable* to the employer or union." (Ibid at 678) (Italics in original). Though it accepted the Board's finding that the foreseeable consequences of a hiring hall was to encourage union membership, this Court rejected the Board's contention, of *per se* illegality.

In his concurring opinion, Justice Harlan asserted: "What in my view is wrong with the Board's position in these cases is that a mere showing of a foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute." (Ibid at 679).

The implicit requirement of the Act that an unfair labor practice be predicated upon objective—not upon foreseeable result—is made explicit in Sec. 8(b)(4). For, as this Court said in *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 98, "It [Sec. 8(b)(4)] describes and condemns specific union conduct directed to specific objectives. . . ."

In this case the Union had no dispute with Safeway; it did not seek to inflict economic injury upon Safeway.

The sole objective of the Union's picketing was to bring pressure upon the primary employer by means of informing the public of its dispute with that primary employer and requesting the public to refrain from aiding the primary employer by purchasing his product. Had the Union intended the picket line to bring economic pressure against Safeway, it would have—in the words of Senator Goldwater—"picketed the distribution company B [Safeway] who carried company A's product [Washington State apples] for sale for the purpose of inducing customers not to patronize company B [Safeway]. . . . " 2 Leg. Hist. 1857.

Thus, independently of the reasons set forth in the opening sections of this brief, it is submitted that the Board's order was properly set aside because the record will not support a finding of proscribed objective. Moreover, as we shall demonstrate, the Board's view unnecessarily requires the consideration of substantial constitutional issues; and for this reason alone should be rejected since a more reasonable construction which avoids such issues is available.

II. SINCE PICKETING IS PROTECTED BY THE FIRST AMENDMENT, THE BOARD'S CLAIM THAT PICKETING PER SE IS "COERCION" RAISES SUBSTANTIAL CONSTITUTIONAL ISSUES; AND WHEN THE ACT IS APPLIED TO RESTRAIN THE UNION'S CONSUMER PICKETING, THE ACT IS UNCONSTITUTIONAL

A. The Board's View of the Act Unnecessarily Raises Substantial Constitutional Issues.

It is a "cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with

the provisions of the Constitution is to be preferred." *Knights Templar & M. Life Indem. Co. v. Jarman,* 187 U.S. 197, 205. To reject the Board's claim that picketing *per se* is coercion does not require an antecedent determination of constitutional right. The Board's view raises a substantial constitutional problem, and this alone is an adequate ground for adopting the more reasonable construction urged by the Union. Quoting from *United States v. Delaware & H. Co.,* 213 U.S. 366, 408, this Court said in *United States v. CIO,* 335 U.S. 106, 121n:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' & M. L. Indem. Co. v. Jarman,* 187 U.S. 197, 205, 47 L.Ed. 139, 145, 23 S.Ct. 108. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Commerce Commission,* 211 U.S. 407, 58 L.Ed. 253, 29 S.Ct. 115."

We are here concerned with peaceful picketing, "the working man's means of communication." *Drivers*

Union v. Meadowmoor Co., 312 U.S. 287, 293. As explained in *Carlson v. California*, 310 U.S. 106, 112-113:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. * * * [Publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by manner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

In the area of free speech, " 'The door barring federal . . . intrusion . . . cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' *Roth v. United States* (354 U.S. [476] at 488)." *Smith v. California*, 361 U.S. 147, 155. See also: *Bantam Books v. Sullivan*, 9 L.Ed.2d 584, 591; *Wood v. Georgia*, 370 U.S. 375, 388.

After *Bakery Drivers Local v. Wohl*, 315 U.S. 769, the decisions of this Court accorded considerably more latitude to governmental restrictions upon picketing than was allowed in other free speech areas such as handbilling. Compare, for example, *Staub v. Baxley*, 355 U.S. 313, 322-325, with *Teamsters v. Vogt*, 354 U.S. 284, 293, or *Near v. Minnesota*, 283 U.S. 697, 713, 721, with *Hughes v. Superior Court*, 339 U.S. 460, 465-466. The difference was said to be justified because "the loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Hughes*, 339 U.S. at 465. In days gone by or on the

record[9] in the particular cases which have come before this Court, the view expressed in *Hughes* was perhaps an understandable one. But today and on the record before this Court in this case it is not.

In 1963 one may seriously question whether a picketing does evoke responses different from those evoked by handbilling or other forms of communication. In the case at bar most of the struck employers were in full operation within a week after the strike started (Appen. A., infra, pg. 34). If workingmen and women in the rural Yakima Valley were ready and willing to take the jobs of their neighbors—and they did—what then is the impact of two women (R. 33) picketing at a metropolitan Seattle supermarket with signs and handbills disclaiming any dispute with the store?[10] Viewed realistically and in light of the record in this case, the Union was engaged in supplying "the public

[9]For example, in *Hughes* (October Term 1949, No. 61) the Plaintiff alleged (R. 6) and the Defendant did not deny (R. 20) "that there exists between organized labor and labor unions in the county of Contra Costa a common agreement and understanding that neither the unions, nor the members thereof, will pass through a picket line, whether the objectives of that picket line are legal or illegal, proper or improper." And in this Court the Plaintiff (Respondent) argued (Br. pg. 8-9): "Furthermore, the undenied allegation of the complaint that organized labor in the area had an agreement and understanding not to pass through any picket line, legal or illegal, suggests that . . . this was a case where organized labor extended its sympathy and support to the dispute with all the familiar consequences that such support entails."

[10]The attitude of workers and the public toward union picket lines has undergone important changes in recent years. This is in part a result of the "non-effect" concept introduced by Section 8(b)(7) (*See e.g. Jay Jacobs Downtown, Inc.*, 140 NLRB No. 127); in part the result of the uncertainty surrounding a worker's right to respect a picket line (*See e.g. Redwing Carriers, Inc.*, 137 NLRB 1545); and in part the result of apathy. *Cf.* Barkin, "The Decline of the Labor Movement," Center for the Study of Democratic Institutions (1961). These factors among others render untenable any dogmatic assertions with respect to the nature or effect of any given picketing situation.

need for information and education with respect to the significant issues of the times." *Thornhill v. Alabama,* 310 U.S. 88, 102.

Hughes v. Superior Court, 339 U.S. 460 does not support a contrary conclusion. As this Court observed in *Hughes,* 339 U.S. at 465, "[h]owever general or loose the language of opinions, the specific situations have controlled decision." *Hughes* in fact presented a situation radically different from that in the case at bar. In *Hughes* the picketing was conducted by a Negro group and "at the time of the controversy about 50% of the customers of the [picketed] store were Negroes." 339 U.S. at 461. In the case at bar there is no evidence of the percentage of Teamster Union members who patronized Safeway.

In *Hughes* the picketing was designed to effect an embargo upon the picketed store. In the instant case the Union meticulously and successfully conducted its program in a manner which precluded an embargo upon Safeway. The Board's refusal to distinguish between picketing at a store to induce customers to refrain from purchasing a given *product* and picketing intended to induce customers to boycott the *store* has resulted in not only the Board's unwarranted reliance upon *Hughes* but also its erroneous reading of the legislative history of the Act. Moreover, in *Hughes* the stated objective of the picketing was to compel the picketed employer to employ Negroes on a pro-rata, population basis. But in the case at bar Safeway was not picketed. The public was specifically advised that the Union had no dispute with Safeway. The Union's program in this case sought to persuade customers to refrain from pur-

chasing Tree Fruits apples—an object which is *not* unlawful. In short, the picketing in *Hughes* sought to achieve an unlawful objective whereas in this case the object of the picketing is lawful. The only similarity between *Hughes* and this case is that in both the picketing occurred at the premises of a retail store; and surely this falls far short of the Board's mark.

The Board is peradventure serious in suggesting that the Union's picketing was not entitled to First Amendment protection since it was free to handbill (Bd. Br. 30). Presumably, then handbilling can be banned if television is available and television can be banned if newspapers are available and newspapers can be banned if picketing is available. The answer of course is that:

> "'[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' *Schneider v. State,* 308 U.S. 147, 193." *Thornhill,* 310 U.S. 88, 105-106. Accord: *Jamison v. Texas,* 318 U.S. 413, 416.

As the court below correctly said, "it may well be that the picketing in this case is closer to the core notion of constitutionally protected free speech than the picketing the Supreme Court has held may be banned" (R. 63-64). A careful review of the First Amendment picketing cases which have been before this Court will not disclose a single case, other than this case, in which the union affirmatively and successfully deleted from its picketing all signal aspects. And, as noted above, it

was this signal aspect of picketing which rendered it subject to otherwise prohibited regulation in those cases.

B. The Act Is Unconstitutional When Applied to Prohibit the Union's Consumer Picketing.

Were this Court to construe the Act as prohibiting the Union's picketing, it would become necessary to decide—under the standards developed in non-picketing free speech cases—whether constitutional rights were transgressed. The "more than free speech" approach embodied in this Court's earlier decisions does not fit this case. Applying the standard enunciated in cases such as *Staub v. Baxley,* 355 U.S. 313, 322-325 and *Talley v. California,* 362 U.S. 60, 63, 65, it is obvious that a restraint upon the Union in this case would deny First Amendment rights. It is not without significance that the only First Amendment case in which an attempt was made to justify a restraint upon peaceful picketing on the theory that the picketing was *per se* coercive resulted in a *per curiam* reversal. *Chauffeurs Union v. Newell,* 356 U.S. 341, *reversing* 180 Kan. 898, 317 P.2d 817.

Returning to our point of origin, we again point out that this case does not require a determination of constitutional right. On the record it is clear that the Union's claim to constitutional protection is substantial, and this is reason enough to reject the strained construction of the Act which the Board seeks to defend.

The Act prohibits threats, restraint and coercion. On the record there was none. In cases arising under the Act *(Drivers Local 639 v. Labor Board,* 362 U.S. 274)

and under the First Amendment *(Chauffeurs Union v. Newell,* 356 U.S. 341) this Court has considered and rejected the contention that picketing is *per se* coercion. The construction of the Act adopted by the court below requires proof of coercion—something which the Board would omit. By requiring the Board to prove on the record in each case that the picketing in fact was coercive, full range can be given the Act without risking a trespass upon constitutional right. This should be required.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

DAVID PREVIANT
212 West Wisconsin Avenue
Milwaukee, Wisconsin

HUGH HAFER

RICHARD P. DONALDSON
811 Alaska Building
Seattle, Washington
Counsel for Respondents.